Thameez Nisha Hasseem (as the administrator of the estate of Bee Fathima @ dll, deceased) v Maybank Allied Bank Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-73–09 OF 2019(P)
ABANG ISKANDAR PCA, HASNAH HASHIM, MARY LIM, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
28 FEBRUARY 2023

Limitation — Charge — Application for order for sale of charged land — Whether limitation period of 12 years applied to an action to enforce a charge — Whether time for purposes of computing limitation ran from date chargor breached obligation to repay under the charge and not from date chargor failed to remedy default specified in Form 16D notice — Whether chargee who failed to obtain order for sale of charged land within limitation period risked losing all rights in the land — Whether chargor would then be entitled to invoke s 340(4)(b) of National Land Code to apply to extinguish chargee's registered interest in the land and require chargee to return title deed to the land together with duly executed and registrable discharge of the charge — Limitation Act 1953 s 21(1)

The appellant ('Thameez') was the administrator of the estate of Bee Fathima ('the deceased') who owned a piece of land. Bee Fathima had given a power of attorney to a woman ('Charijah') to manage the land. In 1984, Charijah borrowed RM240,000 from a bank (which bank was later taken over by the respondent ('MABB')) and charged the land as security for the loan. Following Charijah's failure to repay the loan, the bank obtained an order for sale of the land in 1991. In 2010, the High Court set aside the order for sale. Since then, no action was taken by MABB to recover the loan from Charijah or to enforce the charge. In 2016, after failing to obtain any response from MABB to her enquiry about the status of the charge, Thameez filed an originating summons ('OS') against Charijah for, inter alia: (a) a declaration that the estate of the deceased was entitled to be discharged from liability under the charge; and (b) an order compelling Charijah to pay such sum as was necessary either directly to MABB or into court to secure a discharge of the charge. On coming to know about the OS, MABB intervened and was added as the second defendant in the proceedings. The addition of MABB necessitated the pleadings to be amended. As against MABB, Thameez sought a declaration that MABB had ceased to have any further interest in the land and that its right to enforce the charge had extinguished by operation of law (ie, by limitation) under s 340(4)(b) of the NLC. Thameez sought an order that MABB execute a discharge of the charge on the land and forward the same together with the issue document of title and other related documents to Thameez or her solicitor for their further action. The High Court dismissed the OS. Inter alia,

the court held that: (i) Thameez was a stranger to the loan agreement and charge between Charijah and MABB and had no cause of action to compel Charijah to repay the loan to MABB; and (ii) even if MABB was barred by limitation from enforcing the charge, it could not be compelled to discharge the charge unless its debt had been settled in full. The Court of Appeal affirmed the decision holding, among other things, that Thameez could only use limitation as a defence and not as a cause of action to seek the declaration. The Federal Court granted Thameez leave to appeal. Prime among the questions of law before the court were whether: (A) the 12-year limitation period under s 21(1) of the LA applied to an action to enforce a charge; (B) if it did apply, then if a chargee failed to obtain an order for sale of charged land within the limitation period, whether the chargor was entitled to defeat the registered interest of the chargee under s 340(4)(b) of the NLC and consequently obtain the return of the issue document of title together with a duly executed and registrable discharge of charge from the chargee; and (C) whether time for the purpose of computing the limitation period under s 21(1) of the LA ran from the date of breach by the chargor of his obligation to repay the loan or whether it ran from the expiry of the time period given to the chargor in the NLC's Form 16D notice to remedy the specified breach.

Held, unanimously allowing the appeal, setting aside the decisions of the courts below, declaring that MABB's interest in the land had ceased and that its right to enforce the charge had extinguished by operation of law; ordering MABB to deliver to Thameez or her solicitor within 30 days, a duly executed discharge of the charge, the duplicate charge, the issue document of title to the land and all other relevant documents necessary to effect registration of the discharge of charge; ordering that, in any event, the discharge of the charge on the land shall take effect by operation of law immediately upon the expiry of 30 days from the date of the instant order:

(1) Based on the rules of statutory construction and upon due analysis of the previous decisions of the courts as well as the legislative history of the LA and the NLC, this court concluded that the limitation period of 12 years prescribed in s 21(1) of the LA applied to charge actions. It was also this court's finding that time for the purposes of computation of limitation commenced from the date when the chargor defaulted in repayment and not from the date when the chargor failed to remedy the default under the NLC's Form 16D notice(see paras 105 & 132).

(2) The observations made by the Court of Appeal in *Lim Ban Hooi & Anor v Malayan Banking Bhd* [2018] 5 MLJ 421 were correct — that the Form 16D notice of default could never be issued without there being a default in repayment first. And because certainty was important in the law of limitations, the date of the failure to pay was certain as compared to when the Form 16D notice was issued, as such issuance was dependent upon the chargee's discretion. Hence, the period of limitation in s 21(1)

of the LA began from the date of the failure to repay the debt and not from the failure to remedy the Form 16D notice of default. This court therefore differed from the ratio and conclusions arrived at by the Federal Court in *CIMB Bank Bhd v Sivadevi a/p Sivalingam* [2020] 1 MLJ 583, in particular by Rohana Yusof FCJ on the application of s 21(1) of the LA and by Ahmad Maarop PCA in respect of the commencement of the limitation period (see paras 110–113).

(3) When a chargee failed to obtain an order for sale timeously or at all, or failed to file proceedings in court to obtain a valid and enforceable order for sale of charged land within the limitation period prescribed in s 21(1) of the LA, the chargor was entitled to defeat the registered interest of the chargee under s 340(4)(b) of the NLC and, consequently, obtain the return of the issue document of title pursuant to s 244(1) of the NLC read with O 83 r 1(1) of the ROC (see para 124).

(4) Whilst MABB might theoretically be entitled to claim under the agreement, based on the charge created, its alleged rights or interests were nevertheless legally unenforceable by reason of the lapse of the statutory limitation period. That meant MABB could no longer bring an action in law to enforce or to claim what it regarded as the registrable rights or interests under the charge. If the statutory limitation period had set in, the court was legally empowered to determine the question of title or interest by operation of law under s 340(4)(b) of the NLC — which determination would affect the indefeasibility or otherwise of the title or interest (see paras 121 & 133).

(5) Thameez did not use limitation as a sword but as a defence to MABB's claim that it had an interest in the land; that MABB's claim at that time was barred by limitation. Thameez did not sue MABB. She only sued Charijah. It was MABB who intervened to protect its alleged registrable right and interest in the land and was made the second defendant in the OS, following which necessary amendments were made to the pleadings. Thereafter, Thameez sought for a declaration that MABB ceased to have any interest in the land and that its rights to enforce the charge had extinguished by operation of law (see paras 44 & 48).

(6) Although an order for sale was a statutory remedy provided by the NLC to the chargee, such a remedy could not be enforced without an application being made to the court according to the procedure prescribed in O 83 of the ROC. Thameez was therefore right in contending that the cumulative effect of reading the relevant provisions of the NLC, the ROC, the LA and the Courts of Judicature Act 1964 was that an application for an order for sale pursuant to s 256 of the NLC was an 'action' that fell under the definition of 'action' in s 21(1) of the LA (see paras 77–78).

[Bahasa Malaysia summary

Perayu ('Thameez') adalah pentadbir harta pusaka Bee Fathima ('si mati') yang memiliki sekeping tanah. Bee Fathima telah memberikan surat kuasa kepada seorang wanita ('Charijah') untuk menguruskan tanah tersebut. Pada tahun 1984, Charijah meminjam RM240,000 daripada sebuah bank (bank yang kemudiannya diambil alih oleh responden ('MABB')) dan menggadaikan tanah tersebut sebagai cagaran untuk pinjaman tersebut. Berikutan kegagalan Charijah membayar balik pinjaman tersebut, pihak bank telah memperoleh perintah penjualan tanah tersebut pada 1991. Pada 2010, Mahkamah Tinggi mengetepikan perintah penjualan tersebut. Sejak itu, tiada tindakan diambil oleh MABB untuk mendapatkan semula pinjaman daripada Charijah atau untuk menguatkuasakan gadaian. Pada 2016, selepas gagal mendapatkan sebarang maklum balas daripada MABB terhadap siasatannya tentang status gadaian, Thameez memfailkan saman pemula ('OS') terhadap Charijah untuk, antara lain: (a) satu deklarasi bahawa harta pusaka si mati berhak untuk dilepaskan daripada liabiliti di bawah gadaian; and (b) perintah yang memaksa Charijah membayar jumlah yang perlu sama ada terus kepada MABB atau ke mahkamah untuk memastikan pelepasan gadaian. Apabila mengetahui tentang OS, MABB mencelah dan telah dimasukkan sebagai defendan kedua dalam prosiding. Penambahan MABB memerlukan pliding untuk dipinda. Berbanding dengan MABB, Thameez memohon deklarasi bahawa MABB telah tidak lagi mempunyai apa-apa kepentingan dalam tanah tersebut dan haknya untuk menguatkuasakan gadaian telah hilang oleh kuatkuasa undang-undang (iaitu, melalui had masa) di bawah s 340(4)(b) Kanun Tanah Negara ('KTN'). Thameez memohon perintah supaya MABB melaksanakan pelepasan gadaian ke atas tanah tersebut dan mengemukakannya bersama-sama dengan dokumen hakmilik keluaran dan dokumen lain yang berkaitan kepada Thameez atau peguamcaranya untuk tindakan selanjutnya. Mahkamah Tinggi menolak OS. Antara lain, mahkamah memutuskan bahawa: (i) Thameez adalah orang asing dalam perjanjian pinjaman dan gadaian antara Charijah dan MABB dan tidak mempunyai kausa tindakan untuk memaksa Charijah membayar balik pinjaman kepada MABB; and (ii) walaupun MABB dihalang oleh had masa daripada menguatkuasakan gadaian tersebut, ia tidak boleh dipaksa untuk melepaskan gadaian melainkan hutangnya telah dijelaskan sepenuhnya. Mahkamah Rayuan mengesahkan keputusan dengan memutuskan, antara lain, bahawa Thameez hanya boleh menggunakan had masa sebagai pembelaan dan bukan sebagai kausa tindakan untuk memohon deklarasi. Mahkamah Persekutuan memberikan Thameez kebenaran untuk merayu. Antara persoalan utama undang-undang di hadapan mahkamah adalah sama ada: (A) tempoh had 12 tahun di bawah s 21(1) Akta Had Masa ('AHM 1953') terpakai bagi tindakan untuk menguatkuasakan satu gadaian; (B) jika ia terpakai, maka jika pemegang gadaian gagal untuk mendapatkan perintah penjualan tanah yang digadai dalam tempoh had masa, sama ada penggadai berhak untuk menolak kepentingan berdaftar pemegang

gadaian di bawah s 340(4)(b) KTN dan seterusnya mendapatkan pemulangan dokumen hakmilik keluaran bersama-sama dengan pelepasan gadaian yang dilaksanakan dan boleh didaftar dengan sewajarnya daripada pemegang gadaian; dan (c) sama ada masa untuk tujuan pengiraan tempoh had masa di bawah s 21(1) AHM bermula dari tarikh pelanggaran oleh penggadai mengenai kewajipannya untuk membayar balik pinjaman atau sama ada ia bermula dari tamatnya tempoh masa yang diberikan kepada penggadai dalam notis Borang 16D KTN untuk membetulkan pelanggaran yang dinyatakan.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan mahkamah di bawah, mengisytiharkan bahawa kepentingan MABB dalam tanah tersebut telah terhenti dan haknya untuk menguatkuasakan gadaian telah hilang oleh kuatkuasa undang-undang; memerintahkan MABB untuk menyerahkan kepada Thameez atau peguamcaranya dalam masa 30 hari, pelepasan gadaian yang telah dilaksanakan sewajarnya, gadaian pendua, dokumen hakmilik keluaran tanah dan semua dokumen lain yang berkaitan yang diperlukan untuk melaksanakan pendaftaran pelepasan gadaian; memerintahkan bahawa, dalam apa jua keadaan, pelepasan gadaian ke atas tanah tersebut hendaklah berkuatkuasa mengikut kuatkuasa undang-undang serta-merta selepas tamat tempoh 30 hari dari tarikh perintah semasa:

(1) Berdasarkan peraturan penggubalan berkanun dan berdasarkan analisis sewajarnya terhadap keputusan mahkamah terdahulu serta sejarah perundangan AHM dan KTN, mahkamah ini membuat kesimpulan bahawa tempoh had 12 tahun yang ditetapkan dalam s 21(1) AHM terpakai untuk tindakan gadaian. Ia juga adalah dapatan mahkamah ini bahawa masa untuk tujuan pengiraan had bermula dari tarikh penggadai ingkar dalam pembayaran balik dan bukan dari tarikh penggadai gagal untuk membetulkan keingkaran di bawah notis Borang 16D KTN (lihat perenggan 105 & 132).

(2) Pemerhatian yang dibuat oleh Mahkamah Rayuan dalam *Lim Ban Hooi & Anor v Malayan Banking Bhd* [2018] 5 MLJ 421 adalah tepat — bahawa notis keingkaran Borang 16D tidak boleh dikeluarkan tanpa berlakunya keingkaran dalam pembayaran balik terlebih dahulu. Dan kerana kepastian adalah penting dalam undang-undang had masa, tarikh kegagalan untuk membayar adalah pasti berbanding semasa notis Borang 16D dikeluarkan, kerana pengeluaran tersebut bergantung kepada budi bicara pemegang gadaian. Oleh itu, tempoh had masa dalam s 21(1) AHM bermula dari tarikh kegagalan membayar balik hutang dan bukan daripada kegagalan untuk membetulkan notis keingkaran 16D. Oleh itu mahkamah ini berbeza daripada ratio dan kesimpulan yang dicapai oleh Mahkamah Persekutuan dalam *CIMB Bank Bhd v Sivadevi a/p Sivalingam* [2020] 1 MLJ 583, khususnya oleh Rohana Yusof FCJ atas permohonan s 21(1) AHM dan oleh Ahmad Maarop PCA berkenaan dengan permulaan tempoh had masa (lihat perenggan 110–113).

(3) Apabila pemegang gadaian gagal mendapatkan perintah penjualan tepat pada masanya atau sama sekali, atau gagal memfailkan prosiding di mahkamah untuk mendapatkan perintah penjualan tanah yang sah dan boleh dikuatkuasakan dalam tempoh had yang ditetapkan dalam s 21(1) AHM, penggadai berhak untuk menolak kepentingan berdaftar pemegang gadaian di bawah s 340(4)(b) KTN dan, akibatnya, mendapatkan pemulangan dokumen hakmilik keluaran menurut s 244(1) KTN dibaca bersama A 83 k 1(1) KKM (lihat perenggan 124).

(4) Walaupun MABB secara teori mungkin berhak untuk menuntut di bawah perjanjian tersebut, berdasarkan gadaian yang dibuat, hak atau kepentingannya yang dikatakan tidak boleh dikuatkuasakan secara undang-undang disebabkan oleh luputnya tempoh had masa berkanun. Ini bermakna MABB tidak lagi boleh membawa tindakan undang-undang untuk menguatkuasakan atau menuntut apa yang dianggapnya sebagai hak atau kepentingan boleh daftar di bawah gadaian tersebut. Sekiranya tempoh had masa berkanun telah berjalan, Mahkamah diberi kuasa secara sah untuk menentukan persoalan hakmilik atau kepentingan melalui kuatkuasa undang-undang di bawah s 340(4)(b) KTN — penentuan mana yang akan menjejaskan ketidakbolehsangkal atau sebaliknya hak milik atau kepentingan (lihat perenggan 121 & 133).

(5) Thameez tidak menggunakan had masa sebagai pedang tetapi sebagai pembelaan terhadap dakwaan MABB bahawa ia mempunyai kepentingan dalam tanah tersebut; bahawa tuntutan MABB pada masa tersebut dihalang oleh had masa. Thameez tidak menyaman MABB. Beliau hanya menyaman Charijah. MABBlah yang mencelah untuk melindungi hak dan kepentingannya yang boleh didaftarkan kononnya dalam tanah tersebut dan dijadikan defendan kedua dalam OS, yang mana memerlukan pindaan yang perlu dibuat kepada pliding tersebut. Selepas itu, Thameez memohon deklarasi bahawa MABB tidak lagi mempunyai sebarang kepentingan dalam tanah tersebut dan haknya untuk menguatkuasakan gadaian telah hilang oleh kuatkuasa undang-undang (lihat perenggan 44 & 48).

(6) Walaupun perintah jualan adalah remedi berkanun yang disediakan oleh KTN kepada pemegang gadaian, remedi sedemikian tidak boleh dikuatkuasakan tanpa permohonan dibuat kepada Mahkamah mengikut prosedur yang ditetapkan dalam A 83 KKM. Oleh itu Thameez betul dalam pendapat bahawa kesan kumulatif pembacaan peruntukan berkaitan KTN, KKM, LA dan Akta Mahkamah Kehakiman 1964 adalah bahawa permohonan untuk perintah penjualan menurut s 256 KTN adalah 'tindakan' yang berada di bawah definisi 'tindakan' dalam s 21(1) LA (lihat perenggan 77–78).]

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Rules of Court 2012 O 1 r 4(1), O 5 rr 1, 3, O 15, O 15 rr 6(2)(b), 6, 16, O 83, O 83 r 1(1), 1(1)(b), 1(1)(f)
Specific Relief Act 1950

Appeal from: *Thameez Nisha Haseem (as the administrator of the estate of Bee Fathima, deceased) v Charijah Bt Ameerdin Mohamed Shariff & Anor* [2019] MLJU 298 (Court of Appeal, Putrajaya)

Mahinder Singh Dulku (with Mohd Iqbal bin Zainal Abidin) (Megat Iqbal & Co) for the appellant.
Mong Chung Seng (with Chia Oh Sheng and Medha Ong Ann Ting) (Lee Hishammuddin Allen & Gledhill) for the respondent.
Balwant Singh Purba for watching brief.

Abang Iskandar PCA:

THE QUESTIONS OF LAW

[1] The initial sole question of law for this court's determination as granted at the leave stage is as follows:

Main Q1

In the event the chargee fails to obtain an order of sale timeously or at all, is the chargor entitled to defeat the registered interest of the chargee pursuant to s 340(4)(b) of the National Land Code and consequently obtain the return of the issue document of title freed from the security pursuant to s 244(1) of the National Land Code read with O 83 r 1(1) of the Rules of Court 2012?

[2] Upon application by the appellant, five questions of law were later added for our determination. The further questions are as follows:

Additional Q2

In the event a chargee fails to file proceedings in court to obtain a valid and enforceable Order for Sale of the charged land, pursuant to s 256 of the

National Land Code, within the limitation period prescribed in s 21(1) of the Limitation Act 1953 has the chargee's interest in the registered charge been thereby determined and/or extinguished by operation of law pursuant to, inter alia, s 340(4)(b) of the National Land Code?

Additional Q3

If the answer to question 2 above is in the affirmative, is the chargor's liability under the charge still subsisting? If the answer is that the chargor's liability under the charge is thereby not subsisting, must the chargee, in that event, duly return the issue document of title to the chargor pursuant to s 244(1) of the National Land Code together with a duly executed registrable discharge of charge pursuant to, inter alia, O 83 r 1(1)(f) of the Rules of Court 2012?

Additional Q4

In the absence of any other statutory remedy available to the chargor against the chargee, whose interest in the registered charge has been determined and/or extinguished by its failure to exercise the remedies available to it under the relevant provisions of the National Land Code within the limitation period prescribed in s 21(1) of the Limitation Act 1953, is the chargor thereupon entitled to file proceedings in court to obtain a declaratory judgment (with or without ancillary relief pursuant to O 15 r 16 of the Rules of Court 2012), as was done by the appellant in the instant matter?

Additional Q5

Where a chargee intervenes in an original action between the third party chargor and the actual borrower and the chargee is consequently added as a defendant in the action pursuant to O 15 r 6(2)(b) of the Rules of Court 2012 which provides, inter alia, for the court to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, is the chargor thereupon entitled to contend in the said amended proceedings that the chargee's rights and/or interest in the registered charge have been determined and/or extinguished by operation of s 21(1) of the Limitation Act 1953?

Additional Q6

Ought this honourable court revisit the Federal Court judgment in *CIMB Bank Bhd v Sivadevi a/p Sivalingam* [2020] 1 MLJ 583; [2020] 2 CLJ 151 which held, by a majority, that the proceedings by a chargee for sale of land,

pursuant to ss 256 or 260 of the National Land Code are not subjected to s 21(1) of the Limitation Act 1953 as well as that part of the minority decision of the same court which decided that the cause of action of the chargee to approach the court for an order of sale accrues upon the expiry of the period specified in Form 16D of the National Land Code and not from the date of the breach by the chargor to repay the loan and/or its instalments as stipulated in the charge documents?

[3] My learned sisters Justice Hasnah Mohammed Hashim, Justice Mary Lim Thiam Suan and Justice Rhodzariah Bujang, and my learned brother Justice Harmindar Singh Dhaliwal had read this judgment in draft and they had indicated to me their agreement with it and that the same becomes the judgment of this court.

[4] Throughout the hearing of the appeal before us, learned counsel Mahinder Singh Dulku appeared for the appellant ('Thameez'), and learned counsel Lambert Rasaratnam appeared for the respondent bank ('MABB').

THE FACTS AND THE ANTECEDENT PROCEEDINGS

[5] Before dealing with the important questions of law, it is necessary, at the outset, to state briefly the relevant undisputed facts.

[6] Thameez is the administrator of the estate of Bee Fatima, the deceased. The deceased's land was charged to Co-operative Central Bank Ltd by Charijah (first defendant/respondent at the courts below). That bank went into receivership and was later taken over by MABB. Charijah was granted a power of attorney by the deceased in 1983 to manage the property. Charijah charged the said land as a security for a loan of RM240,000 that she obtained on 28 May 1984. Charijah defaulted in repayment and an order for sale of the land was granted in 1991 after a statutory notice under s 254 of the National Land Code (Form 16D) dated 30 July 1986 was ignored. In 2010, the said Order for Sale was set aside by the High Court. Since then, no action was taken by MABB to enforce the said charge or to recover the loan from Charijah.

[7] Thameez wrote a letter in 2015 to MABB requesting for information on the status of the charge and the action that MABB has taken against Charijah. MABB did not respond to the said request. That finally culminated in the filing of the originating summons in 2016 by Thameez against Charijah. MABB intervened and was subsequently made a party to the suit as the second defendant and Charijah as the first defendant. Necessary amendments were made to the pleadings by virtue of the inclusion of MABB to the suit as one of the defendants.

[8] At the High Court, Thameez claimed, as against Charijah, for a declaration that the estate of the deceased is entitled to be discharged and exonerated from the liability under the charge; and for an order compelling Charijah:

(a) to pay MABB the sum as required by MABB for the discharge of the charge;

(b) to pay into court the sum sufficient for the discharge of the charge; or

(c) to pay damages for being in default to repay the loan that causes loss and damage to the estate of the deceased.

[9] These claims were dismissed by the High Court on the basis of the absence of agreement between Thameez and Charijah in so far as the loan is concerned. Thus, Thameez has no cause of action to compel Charijah to repay the loan to MABB. The High Court was of the view that even if the court grants the order sought by Thameez, that order will be a useless order and cannot be enforced if Charijah refuses to comply because Charijah is entitled to raise the defence of limitation and because there was no demand by MABB.

[10] The High Court also decided that MABB as the chargee is entitled to receive direct payment from the chargor for the discharge of the charge. An order compelling Charijah to make payment to the court for the discharge of the charge is a curtailment of MABB's right, contrary to the terms of the charge itself.

[11] As against MABB, Thameez prayed for, inter alia, a declaration that the chargee ceased to have any estate or interest in the land and that MABB's rights to enforce the charge has extinguished by operation of law; and an order that MABB execute a memorandum of discharge of the charge.

[12] The High Court also dismissed this claim because 'equity and common sense dictate that the bank cannot discharge the charge until the debt is fully settled' despite the fact that the bank is barred by limitation to foreclose the charged property. The High Court was of the view that to rule otherwise would cause unjust enrichment to Thameez.

[13] On appeal, the Court of Appeal affirmed the decision of the High Court and dismissed Thameez's appeal primarily upon reliance on the judgment of the Federal Court in *RHB Bank Bhd (previously known as United Malayan Banking Corp Bhd and then as Sime Bank Bhd) v Wong Kok Leong (as executor and trustee of the estate of Wong Kwong Wah, deceased) & Ors* [2017] 4 MLJ 281 ('Wong Kok Leong') that rejected the use of limitation as a cause of action to seek a declaration that the defendant was barred by limitation from

exercising its rights under the lienholder's caveats. The Court of Appeal was of the view that Thameez's application to get the title without payment of what is due and owing to MABB fails based on *Wong Kok Leong*.

ANALYSIS OF THE ISSUES OF LAW

[14] Upon analysing the six questions of law, we found three issues that are primarily determinative of the present appeal. They are:

(a) determination of title or interest by operation of law;

(b) the application of the 12 years' limitation period to charge actions; and

(c) the nature and legal effect of the limitation period.

Determination of title or interest by operation of law

[15] Section 340 of the National Land Code ('the NLC') deals with the conferment of indefeasibility of title or interest upon registration. However, sub-s 4 provides for situations allowing: (i) the exercise of any power as conferred by the NLC or other written law in respect of any land or interest; or (ii) the determination of any title or interest by operation of law. It reads:

> Section 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> ...
>
> (4) Nothing in this section shall prejudice or prevent —
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) *the determination of any title or interest by operation of law.*

[16] Thameez submitted that a chargor is entitled to defeat the registered interest of the chargee pursuant to s 340(4)(b) of the NLC because the failure to act within the statutory limitation period under the LA 1953 activates the operation of the determination of any title or interest by operation of law.

[17] Thameez argued that if legal rights were liable to be lost by delay or laches (*Jarvis (deceased); Edge v Jarvis* [1958] 2 All ER 336), what more if it was caused by the failure to act within the statutory limitation. Hence, as equitable defences such as laches, acquiescence and delay were considered by the Federal

Court in *CIMB Bank Bhd v Sivadevi a/p Sivalingam* [2020] 1 MLJ 583; [2020] 2 CLJ 151 ('Sivadevi') as a 'cause to the contrary' in s 256(3) of the NLC, this line of reasoning shall apply with equal force to the interpretation of 'the determination of title or interest by operation of law'. In other words, Thameez contended that the application of s 340(4)(b) of the NLC is similarly activated when MABB did not act within the statutory limitation period.

[18] In this respect, MABB agreed in principle that other legal and equitable defences are available to the defaulting chargor if the chargee bank takes forever to act or to enforce the charge, based on *Sivadevi*. However, it was submitted that this court must decline to entertain Thameez's argument on laches because this was not pleaded or raised in the amended OS or in the affidavits and was not argued in the courts below. MABB argued that it is settled principle that a party should be barred from raising an issue for the first time on appeal (*Wong Kok Leong*).

[19] Additionally, as laches is an equitable defence which is statutorily acknowledged in s 32 of the Limitation Act 1953 ('the LA 1953'), its application is subject to equitable principles — that the 'courts will not assist a litigant with unclean hands'; and that 'he who seeks equity must do equity'. Thameez was argued to have not fulfilled both equitable principles in order to apply the equitable defence of laches because she has not paid the outstanding amount, and yet is requesting for the return of the title deeds (*Phileoallied Bank (M) Bhd v Sakuntalathevy d/o Manickavasagam* [2007] 1 MLJ 581; [2007] 1 CLJ 72; and *Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538).

[20] MABB further submitted that just as the defence of limitation, laches cannot be used as a sword to found a cause of action, and it equally cannot be used to extinguish rights. *Sivadevi* and *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779; [2014] 9 CLJ 1012 that were cited by Thameez stand only for the proposition that laches may be raised as a defence to oppose an order for sale, and not in an action to defeat the registered interest of the bank as chargee or to seek the return of the title. Hence, MABB as the registered chargee possesses indefeasible rights and interest in the land pursuant to s 340(1) of the NLC.

[21] Further, MABB argued that s 340(4)(b) of the NLC cannot by itself operates to determine any title or interest because it is merely a saving provision which provides for determination of any title or interest in land by operation of any other law. Thameez on the other hand argued that s 340(4)(b) of the NLC is not a saving provision but a stand-alone substantive provision because it is not a new provision in the NLC. Its origin is traceable to s 42(vi) of the Land

Code 1928 (Cap 138). Moreover, its operation is not temporary. Reference was made to *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 ('View Esteem'). A

[22] There is also another point raised in respect of the interpretation of the application of s 340(4)(b) of the NLC. MABB contended that this provision applies only to matters which occur prior to or at the time of registration of title or interest — just as when the court is considering the vitiating categories in s 340(2) of the NLC which cannot be construed in isolation and divorced from other provisions of the section. B C

Meaning of 'by operation of law'

[23] At the outset, it needs stating that s 340(4)(b) of the NLC is not a saving provision as alleged by MABB. It is a substantive provision dealing with matters related to indefeasibility. D

[24] As was stated by the Federal Court in *View Esteem*, a saving provision, just like a transitional provision, preserves some existing legal rule or right from its operation, and is basically temporary in duration. It was held that: E

> [29] ... The object of a saving provision is clear enough that is not to interfere with existing rights. In *Re Thompson Bedford v Teal* (1889) 45 Ch D 161, Cotton LJ observed (at p 173):
>
> > A saving clause as a general rule is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from interfering with rights already acquired. F
>
> [30] A saving provision narrows the application of the new act and not enlarge it. In *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1; [1996] 1 CLJ 529 the Federal Court per Edgar Joseph FCJ observed (at p 14 (MLJ); p 538 (CLJ)): G
>
> > It is a well-known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation.
>
> [31] The saving provision is also a transitional provision. It is essentially temporary in duration and would become spent in the course of time in tandem with the new act which deals with the new circumstances. H

[25] The meaning and application of s 340(4)(b) of the NLC was explained by Gopal Sri Ram JCA in the Federal Court case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 ('Krishnadas'). In this case, His Lordship applied the cases that interpreted the then s 42 of the FMS Land Code (Cap 138), the precursor of s 340(4)(b) of the NLC because His Lordship was of the view that the difference in language between the two I

A sections does not result in any difference in meaning or consequence; hence, the cases that have interpreted s 42 of the Land Code may safely be relied upon when construing s 340 of the Code. Then s 42 provides that:

> 42(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.
>
> B
>
> ...
>
> (vi) Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law.

C **[26]** In arriving at his conclusion, His Lordship cited *Yong Joo Lin Yong, Shook Lin and Yong Loo Lin v Fung Poi Fong* [1941] 1 MLJ 63 and *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 ('Ong Chat Pang') and concluded that:

D
> In our judgment, *Parliament enacted s 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s 340 of the Code.* While recognizing that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), we cite, by way of
E illustration only, cases decided under the Moneylenders Act 1951.

[27] Similar approach is seen in *Datin Siti Hajar v Murugasu* [1970] 2 MLJ 153 ('Datin Siti Hajar') where Syed Agil Barakbah J expressed his view that:

F
> Both ss 42 and 340 deal with indefeasibility of registered titles but the latter is wider in its terms as to include easements. In this connection, I am in agreement with what Horne J said in *Yong Joo Lin*'s case on p 75 (reprint p 64), in dealing with almost the same point:
>
> G
> > Mr Shearn's arguments follow more or less the grounds of appeal. I reject his argument that s 42(vi) of the Land Code lets in the application of the common law. *In my view an indefeasible title means a title which cannot be made null and void in the first place by anything and then only by the provisions creating exceptions. A defeat by operation of law therefore means a total defeat.*

H **[28]** In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, the Supreme Court ruled that s 340(4)(b) of the NLC is one of the exceptions to indefeasibility which may be established as a category of cases falling under the 'cause to the contrary' in s 256(3) of the NLC. It held that:

I
> In our judgment, 'cause to the contrary' within s 256(3) may be established only in three categories of cases.
>
> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary.

...

In other words, *a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) above will be held to have established cause to the contrary under s 256(3).*

[29] Based on these authorities, it is our considered view that s 340(4)(b) of the NLC is far from being a 'saving' provision. The determination of any title or interest by operation of law at any point of time affects indefeasibility. With that in mind, we shall examine, whether s 21(1) of the LA 1953 comes within the meaning and application of 'by operation of law'.

What does the Limitation Act 1953 deal with?

[30] The LA 1953 is an 'Act to provide for the limitation of actions and arbitrations' but which shall not apply to 'any action or arbitration for which a period of limitation is prescribed by any other written law or to any action or arbitration to which the Government or the Government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law'.

[31] Originally, our limitation law was based on the Indian model. However, due to what was regarded as 'complicated and obsolete' position of the then Limitation law, an improvement was made by the enactment of the Limitation Act 1953, modelled on the English Law of Limitations. The Hansard during the Second Reading of the Limitation Bill 1952 recorded that:

A Limitation law should be clear as far as is possible, and as far as possible should apply uniformly in most types of actions. Not only is the present law complicated, but it might also fairly be described as obsolete since — the law was passed in 1898 — *it does not really tie up in any way with our present Land system*.

...

The main principles of the Bill are three. First of all, the limitation for nearly all actions is fixed at six years. We sweep away this dodging about between one year and three years and six years formerly. *We have made the limitation period for actions to recover land 12 years, and we have made the period for actions to enforce a security 12 years*...But for all practical purposes there will be two periods of limitation — one of six years and one of 12 years. We hope by this means that we shall eliminate at one stroke a great mass of complicated law dealing with causes of action.

...

The principal change — and the really important change of which I ask Council to approve — is that we have swept aside this vast complication of various types of action leading to interminable argument and in many cases gross injustice and *have substituted instead a simple and uniform system which can be clearly understood not only by lawyers but, more important really, by the public at large*'.

[32] The LA 1953 is therefore a law of general application, regulating the limitation period for commencing a cause of action — generally at either six or 12 years. It actually was actuated by the desire of the government at that time, 'to sweep aside this vast compilation of various types of action leading to interminable argument and in many cases gross injustice by substituting it with a simple and uniform system which can be understood' by all and sundry.

[33] The Supreme Court in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 stated the rationale for prescribing the period of limitation in the following manner:

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense. The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[34] On the purposes of limitation law, the English Court of Appeal in *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304 stated that:

> ... Limitation statutes are intended to prevent stale claims, to relieve a potential defendant of the uncertainty of a potential claim against [him] and to remove the injustice of the increasing difficulties of proof as time goes by ...

Limitation as a defence or a cause of action

[35] The Federal Court in *Wong Kok Leong*, in citing with approval the decision of the Court of Appeal in *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the Estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812 ('Sakapp Commodities') held that limitation is merely a defence to an action and therefore cannot be used to found a cause of action.

[36] It was on this basis that MABB argued that Thameez's claim against MABB should fail because her reliance on the Limitation Act is legally wrong, misconceived and against the settled principle of law because the law of limitation operates as a procedural defence and cannot be relied on to found a cause of action.

[37] In response, Thameez argued that the failure of MABB to commence the action within the 12 years period gives Thameez an accrued right to plead a time bar just as any other statutory or contractual protection against a future suit. *Kenderaan Bas Mara v Yew Bon Tew & Anor* [1980] 1 MLJ 311 and *Yew*

Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1 ('Yew Bon Tew') were referred to as the authorities to show that 'there can be no distinction in principle between a right given by law to commence an action and defence given by law which bars an action' — that an 'accrued right' to plead a time bar is in every sense a right, even though it arises under an act which is procedural.

[38] Thameez further argued that she was not using the limitation as a cause of action as decided in *Sakapp Commodities,* but was resisting MABB's allegation that it has an interest in the property upon intervening in the original action. In other words, Thameez was mounting a defence to MABB's claim.

[39] In response, MABB contended that it intervened as a defendant, and not as the plaintiff, merely to defend Thameez's action — hence, MABB was protecting, as opposed to enforcing, its rights and interest under the charge that will be affected by the relief sought by Thameez in the original OS prior to intervention.

[40] As regards Thameez's reference to *Yew Bon Tew*, MABB argued that the facts in *Yew Bon Tew* must be distinguished and assessed in the context of the facts in that case when the Privy Council held an accrued right to plead a time bar is in every sense a right even though it arises under an Act which is procedural.

Our view

[41] In this respect, the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 stated that although the limitation arises out of a procedural law, it is as much a 'right' as any other statutory or contractual protection against a future suit. It is a defence mechanism available to a defendant with the following effects:

> ... When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence ...

[42] We note that s 4 of the LA 1953 requires specific pleading of the limitation in an action. It states that:

> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[43] Bearing in mind that legal requirement, and while we agree that the statutory limitation is legally a defence, the peculiarity of the facts of each case must be examined in order to assess, whether Thameez invoked the limitation point as a defence or a cause of action. That is because, 'every decision of the courts depends substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts' (*Fong Kong Meng & Anor v Public Prosecutor* [2019] 12 MLJ 110), even in a situation where the court is applying the same legal principles.

[44] In this case, Thameez did not sue MABB, she sued Charijah. It was MABB who intervened for the protection of its alleged registrable right and interest in the land concerned. Upon intervening, MABB was made the second defendant, following which, necessary amendments were made to the pleadings. Thereafter, Thameez sought for a declaration that the charge ceased to have any estate or interest in the land and that MABB's rights to enforce the charge has extinguished by operation of law.

[45] Order 15 r 6(2)(b) of the Rules of Court 2012 ('the ROC') provides the following:

> (2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —
>
> ...
>
> (b) order any of the following persons to be added as a party namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or ...
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[46] The Court of Appeal in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488 referred to *TSB Private Bank International SA v Chabra and another* [1992] 2 All ER 245, that adding one as a party is necessary to ensure that matters be effectually and completely determined and adjudicated upon:

> *I considered that the presence of the company before the court was necessary to ensure that all matters in dispute in the cause or matter might be effectually and completely*

determined and adjudicated upon by adding the company as a party. I also considered that the position of the company fell within the broad provisions of O 15 r 6(2)(b)(ii) namely that there (sic)(they) could be joined as a party:

> any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter ...

[47] The Federal Court in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 essentially enunciated that an amended writ has to be made by the plaintiff if there exists an application under r 6:

> Furthermore, O 15 is concerned with the very early stage of a proceeding, to have all the necessary parties in before the trial begins. Thus, r 8 provides that, *when the order under r 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance*. All these happen before the trial.

[48] Thus, in our view, we agree with Thameez that MABB ought not to be permitted to contend that it was Thameez who brought proceedings against MABB. In other words, Thameez is not, in these circumstances, using limitation as a sword but as a defence to MABB's claim that it has an interest in the property in question, that the claim at that time was barred by limitation.

[49] As MABB in its application to intervene had mentioned that it had an interest over the property, this has resulted in Thameez, having no choice, but to use limitation as a defence against MABB. It is crucial to note that in the first place, Thameez commenced an originating summons against Charijah only. It was MABB, who on its own accord applied to intervene and subsequently was added as the second defendant/respondent in the courts below. We therefore agree with Thameez that O 15 r 6(2)(b) has resulted in MABB being stopped from contending otherwise.

[50] It is noteworthy that Thameez had no intention to commence an action against MABB. It was Charijah, whom Thameez initially commenced an action against. Inevitably, Thameez had to put up a defence against the contention by MABB who had asserted that they had an interest over the property.

[51] Thus, in our view, in light of O 15 r 6(2)(b) of the ROC, Thameez is entitled to contend in the said amended proceedings that the MABB's rights and/or interest in the registered charge have been determined and/or

extinguished by operation of s 21(1) of the LA 1953. Question 5 is therefore answered in the affirmative.

The 12 years limitation period — Does it apply to charge actions?

What does *Sivadevi* decide?

[52] We begin by analysing the judgment of this court in *CIMB Bank Bhd v Sivadevi a/p Sivalingam* [2020] 1 MLJ 583; [2020] 2 CLJ 151 ('Sivadevi'). Interestingly, *Sivadevi* is the latest authority both for Thameez and MABB on the question of whether the limitation period of 12 years applies to charge actions.

[53] The reason being, although *Sivadevi* was a unanimous decision of a three-panel judge, the reasoning differs between Ahmad Maarop PCA on the one hand and Rohana Yusof FCJ with Mohd Zawawi Salleh FCJ on the other, when allowing CIMB's appeal. Ahmad Maarop PCA was of the view that the limitation period of 12 years applies to charge actions while Rohana Yusof FCJ, concurred by Mohd Zawawi Salleh FCJ held otherwise. To appreciate the differences, there is a need to elaborate the facts and the reasoning of the learned Justices in *Sivadevi*.

[54] Briefly, the factual matrix in *Sivadevi* is this. The loan agreement entered into on 18 January 2000 was secured with a deed of assignment. Following the issuance of title to the land and in place of the deed of assignment, a third-party charge under the NLC over the land was presented and registered on 24 December 2014. It was not disputed that the last payment of the loan was made on 12 May 2003. On 20 November 2007 a judgment in default was entered. This was set aside by consent on 9 January 2012. By a letter dated 29 January 2016, a notice of default in Form 16D was issued but this was not complied with. On 8 August 2016, an originating summons ('OS') for an order for sale of the land was filed and allowed by the High Court.

[55] This decision was reversed by the Court of Appeal because it was of the view that the action was time barred under s 21(1) of the LA 1953. Further, the Court of Appeal decided that the computation of the period of limitation begins upon the failure to service the repayment and not upon the expiry of the period specified in the notice in Form 16D.

[56] At the Federal Court, the case was heard by a five-member panel. The decision of the Federal Court was reserved. When it was decided, two members had since retired and the appeal was allowed unanimously by the remaining three members — but on different grounds. Separate judgments were written.

As stated earlier, one was by Ahmad Maarop PCA and the other by Rohana Yusof FCJ, which was agreed to by Mohd Zawawi Salleh FCJ. A

[57] In allowing the appeal by the bank, Ahmad Maarop PCA held that the period of limitation applies to charge actions, but the computation of time begins not from the failure to repay the loan but upon the failure to remedy the breach within the period specified in the notice in Form 16D. The stated reasons are: B

(a) the OS applying for an order of sale of the land charged under the NLC comes within the ambit of an action 'to enforce such mortgage or charge' in s 21(1) of the LA 1953; C

(b) the nature of an application for an order for sale under the NLC is an enforcement of the chargee's rights of his statutory remedy against the chargor in default based on the registered charge. Reference was made to *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; [1993] 4 CLJ 332 ('Kandiah Peter'); and D

(c) based on ss 254 and 255 of the NLC and the decision of the Supreme Court in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805; [1997] 3 CLJ 274 the decision of the Federal Court in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601 and the decision of the Court of Appeal in *Perwira Affin Bank Bhd v Lim Weow* [1998] 3 MLJ 56 ('Perwira Affin'), Ahmad Maarop PCA held that 'the right to receive the money accrued' in s 21(1) of the LA begins upon the failure of the chargor to remedy the default specified in the Form 16D notice. E F

[58] Rohana Yusof FCJ, on the other hand, decided that the period of limitation in s 21(1) of the LA 1953 does not apply to charge actions because: G

(a) s 21(1) of the LA 1953 consists of two categories of action only — an action to recover money; and an action to recover proceeds of the sale of land or personal property. Her Ladyship was of the view that the part 'to enforce such mortgage or charge' is to be read conjunctively with the action to recover money. This means that 'to enforce such mortgage or charge' is not a separate action but relates to an action to recover money. This approach of interpretation was due to the existence of the punctuation comma appearing after the word 'charge', which is considered to be significant in construing the real meaning of s 21(1) of the LA 1953. Reference was made to the decision of the Supreme Court in *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112 and the decision of the Federal Court in *Sathiyamurthi v Penguasa/Komandan, Pusat Pemulihan Karangan,* H I

Kedah [2006] 6 MLJ 593 relating to the role of punctuation comma in a legal provision. Her Ladyship was of the view that s 21(4) of the LA 1953 amplified such interpretation suggesting the distinction between actions to recover monies secured by a charge to that of an action to realise the charge security;

(b) historical reason — that when s 21(1) of the LA 1953 was enacted and even in the later introduction of the provisions relating to orders for sale under s 256 of the NLC, Parliament had not provided any limitation period for those proceedings relating to orders for sale especially the fact that the summons filed to enforce orders for sale are not 'actions'. Her Ladyship took the view that since our s 21 is substantially in *pari materia* with s 20 of the UK Limitation Act 1980 — an updated version of s 18 of the UK Limitation Act 1939, the fact that England does not subscribe to the Torrens system, by parity of reasoning, s 18 of the 1939 Act subsequently reproduced in s 20 of the 1980 Act could not have been envisioned to apply to a Torrens-based system. Likewise, it similarly could not have been foreseen that our s 21(1) of the LA 1953, without the necessary modification, would cater to the provisions relating to orders for sale in the NLC; and

(c) an order for sale is not an action, nor is it a judgment, while s 21(1) of the LA 1953 only applies to an action — an action to recover money secured by a mortgage or charge and has no application to the exercise of the statutory right of the charge under the NLC. *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470 ('Peh Lai Huat'); *Kandiah Peter* and *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 ('Low Lee Lian') were cited as the authorities for such proposition. Her Ladyship emphasised that an order for sale is merely an exercise of a statutory remedy as a chargee. Reference was made to *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 ('Dhanoa'); *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221 ('Chong Bun Sun'); *Wong Soon Kion v CIMB Bank Bhd* [2018] MLJU 1847 ('Wong Soon Kion').

[59] In deciding that the defence of limitation under s 21(1) of the LA 1953 is inapplicable to charge actions, Her Ladyship stated that if the bank takes forever to act or to enforce the charge, defences such as laches, acquiescence and other equitable defences may be pleaded against it, or to be raised as a cause to the contrary in resisting an application for an order for sale in s 256(3) of the NLC (*Low Lee Lian*; and *Phileoallied Bank (M) Bhd v Sakuntalathevy d/o Manickavasagam* [2007] 1 MLJ 581; [2007] 1 CLJ 72).

Past decisions on the applicability of s 21(1) of the LA 1953

[60] In this regard, Thameez took the view that the reasoning and decision by Rohana Yusof FCJ on the inapplicability of the limitation period to charge actions as being fatally flawed and premised upon an incomplete consideration of the law, partly because there was no reference to previous decisions that had consistently held s 21(1) of the LA 1953 as being applicable to charge actions (reference was made to *Lim Ban Hooi & Anor v Malayan Banking Bhd* [2018] 5 MLJ 421; [2018] 6 CLJ 545 ('Lim Ban Hooi'); *Wan Zubaidah bt Wan Mahmood (also as representative to the estate of Nik Ab Rahman bin Nik Mat, deceased) & Anor v CIMB Bank Bhd* [2018] 6 MLJ 460; [2019] 8 CLJ 197 ('Wan Zubaidah'); *Sivakadatcham a/l P Sethuram Vandayar v CIMB Bank Bhd (previously known as Bumiputera-Commerce Bank Bhd)* [2019] 6 MLJ 816; [2019] 6 CLJ 504 ('Sivakadatcham'); *Sri Rimba Mentari Development Sdn Bhd v Southeast Asia Special Asset Management Bhd (SEASAM)* [2018] MLJU 1618; [2019] 8 CLJ 322 ('Sri Rimba Mentari'); *Sakinah v Kua Teong How* [1941] 1 MLJ 166 ('Sakinah'); *Haji Abdul Rahman and another v Mahomed Hassan* [1917] AC 209 ('Haji Abdul Rahman'); and *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266; [1984] 1 CLJ Rep 230) ('Mahadevan').

[61] MABB on the other hand argued that those cases referred to by Thameez concerned only with the issue when time starts to run for the purpose of limitation in respect of an order for sale application. In those cases, the attention of the court was not properly drawn to the applicable land law system in Peninsular Malaysia at the time when the LA 1953 was enacted.

Our view

[62] First and foremost, we must state that of all cases that were cited before us, it is only Rohana Yusof FCJ agreed to by Mohd Zawawi Salleh FCJ in *Sivadevi* and Abdul Aziz Mohamad JCA in *Peh Lai Huat* that decided s 21 as being inapplicable to charge actions.

[63] Ahmad Maarop PCA in *Sivadevi* and the Court of Appeal in the rest of the cases — *Lim Ban Hooi*; *Wan Zubaidah*; *Sivakadatcham*; *Sri Rimba Mentari*; *Mahadevan*; Perwira Affin; *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61; [2012] 1 LNS 811 ('Jigarlal'); *Wong Soon Kion* and Gopal Sri Ram JCA in *Peh Lai Huat*, ruled that s 21 of the LA 1953 does apply to charge actions. The only difference between those cases is in respect of the commencement of the period of limitation.

[64] In fact, as was highlighted by Thameez, pre-Merdeka cases such as

Sakinah and *Haji Abdul Rahman* show that the then Limitation Enactment applies to matters relating to the enforcement of registered charge and/or mortgage in question in the Federated Malay States. The decision of the Privy Council in *Haji Abdul Rahman* was cited with approval by the Federal Court in *Mahadevan*.

[65] On the strength of the discussion presented in those authorities and the analysis of the relevant statutory provisions in the NLC, the LA 1953 and the ROC, we are of the considered view that s 21(1) of the LA 1953 does apply to charge actions.

Section 21(1) of the LA 1953 — Two or three categories of action?

[66] At this juncture, it would be appropriate to restate the general principles of law applicable to the construction of a statutory provision. We are fully aware that 'the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction of a statute …' (*Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177).

[67] And when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy (*Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 (HL). The court must also look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself (*Queen v Eduljee Byramjee* (1946) 3 MIA 468 (PC).

[68] In construing s 21(1) of the LA 1953, we are also guided by what the Federal Court in *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69 laid down as the rules of construction of statutory law. It states that:

> It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.
>
> > It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed', per Bayley J in *R v Ramsgate (Inhabitants)* (1827) 6 B & C 712.

Defining 'action'

[69] Thameez argued that the word 'action' in the LA 1953 includes the application for the order for sale of charged lands. In this respect, it was

submitted that the cumulative effect of reading the relevant provisions in the NLC, the ROC, the LA 1953 and the Courts of Judicature Act 1964 ('CJA') means that an application for an order for sale pursuant to s 256 of the NLC is an 'action' in 'court', hence an 'action' under s 21(1) of the LA 1953. Our attention was brought to ss 256(2) and 447(1) of the NLC s 3 of the CJA s 2 of the LA 1953 and O 83 r 1(1)(b), O 5 rr 1, 3, O 1 r 4(1) of the ROC.

[70] Briefly, it was submitted that the phrase '*Any application* for an order for sale' shall be made to the court in accordance to the law relating to civil procedure in s 256(2) brings the application of the ROC — which law is given a statutory force by s 447(1) of the NLC. Order 83, in particular r 1(1)(b) relating to the 'sale of the charged property' is relevant. In this respect, O 5 rr 1 and 3 mandate that the 'proceedings' relating to the application for an order for sale of charged property shall be begun by Originating Summons; and the meaning of 'proceeding' as contained in O 1 r 4(1) of the ROC is 'any proceedings whether in open court or in chambers and *includes an application at any stage of a proceeding* ...'. Thameez also highlighted ss 16 and 17 of the CJA in respect of the making of the rules of court and the definition of 'action', 'cause' and 'Court' in s 3 of the CJA. The definition of 'action' in s 2 of the LA 1953 includes 'a suit or *any other proceeding in a court of law*'.

[71] Hence, Thameez argued that without any intention of undermining the principle of *stare decisis*, decided cases should not be followed blindly, especially when having regard to the facts of each case, '... what is implied must not conflict with the express language of the statute' (*Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313 (SC); *Lim Ban Hooi*).

[72] In contrast, MABB contended that when a chargee applies for an order for sale under the NLC, he is not commencing an 'action', but is applying for statutory remedy for an order for sale as provided under the NLC (*Kandiah Peter*; *Dhanoa*; *Chong Bun Sun*; *Wong Soon Kion*; *Low Lee Lian*; *Peh Lai Huat*; *Jigarlal*; *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almerhum Sultan Idris* [1933] 2 MLJ 18 ('VRKRS Chettiappah'). It was submitted that MABB as the creditor should be allowed to realise its security at any time to recover a debt due and owing — because an action on one hand and execution of a judgment on the other differs for the purpose of limitation (*Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304).

[73] MABB argued further that there is a fundamental difference between an application for order for sale under the NLC and an action to enforce a charge. The former is essentially a proceeding to enforce a statutory right while the latter deals with an action to enforce a contractual right under the charge. Section 21(1) of the LA 1953 was submitted to apply only in the latter category which is an action *in personam,* and not an action *in rem* (*Tan Kong Min v*

Malaysian National Insurance Sdn Bhd [2006] 1 MLJ 601).

[74] Additionally, MABB submitted that to construe s 21 as providing three categories of action means a contradiction or redundancy of ss 21(2) and (4) which expressly govern limitation in respect of foreclosure action by a mortgagee. MABB argued that it is settled law that a statute should be interpreted harmoniously so as not to offend or render redundant other provisions of the Act (*Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165).

[75] Moreover, according to MABB, giving s 21(1) of the LA 1953 a wide interpretation would result in an anomalous situation because that means an application for an order for sale in court is subject to the LA 1953 while a similar application in the Land Office is not — because 'action' in s 21(1) of the LA 1953 cannot be enlarged to include proceeding other than a suit or proceeding in a court of law (*Majlis Perbandaran Klang v Generation Products Sdn Bhd* [2006] 4 MLJ 635 ('Generation Products Sdn Bhd'); *Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v Yeoh Oon Theam* [2016] MLJU 1126; [2017] 3 CLJ 557 ('Yeoh Oon Theam'). Therefore, according to MABB, the court must avoid a construction of statutory provision that will give rise to an inconsistent and anomalous result (*Majlis Perbandaran Seremban v Tenaga Nasional Bhd* [2020] 12 MLJ 1; [2020] 10 CLJ 715 *Generation Products Sdn Bhd Yeoh Oon Theam*).

[76] In response to this point, Thameez argued that the point of a Land Office Title, vis a vis limitation was considered by the Court of Appeal in *Wan Zubaidah* where s 21(1) of the LA 1953 was applied. There, the order for sale was set aside despite the title being a Land Office Title.

Our view

[77] There is no dispute that an order for sale is a statutory remedy provided by the NLC to the chargee in respect of the charged land (*Kandiah Peter*; *Dhanoa*; *Chong Bun Sun*; *Wong Soon Kion*; *Low Lee Lian*; *Peh Lai Huat*; *Jigarlal*; *VRKRS Chettiappah*; and *M&J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294).

[78] That said, it must nevertheless be borne in mind that such statutory remedy cannot be enforced without there being 'any application' first made to court according to the required procedure prescribed in O 83 of the ROC. In this regard, we agree with the argument submitted by Thameez that the cumulative effect of reading the relevant provisions in the NLC, the ROC, the LA 1953 and the CJA means that the application for an order for sale pursuant to s 256 of the NLC is an 'action' falling under the definition of 'action' in s

21(1) of the LA 1953.

[79] In this regard we are not persuaded by MABB that reading s 21(1) of the LA 1953 widely will bring redundancy to ss 21(2) and (4) and would also result in an anomalous situation in respect of an order for sale at the Land Office, which was argued to be not subject to the LA 1953.

[80] First, we do not find any contradiction or redundancy when reading s 21(1) of the LA 1953 as providing three categories of actions. While s 21(1) is couched in general terms, ss 21(2) and (4) deal specifically with foreclosure action in respect of mortgaged personal property and of mortgaged land respectively.

[81] Similarly, there is also no anomaly in respect of the application for an order for sale in the Land Office because we observed that this aspect has been clarified by the Court of Appeal in *Wan Zubaidah* as highlighted by Thameez relating to the applicability of the LA 1953, with which we agree.

[82] In reaching the conclusion that the word 'action' in s 21(1) includes the order for sale of charged land, we have considered that the express word in a statute must be given its ordinary and literal meaning first and foremost, and when necessary, as in this case, to be read together with other relevant provisions within the same legislation and across other relevant legislations in order to define its meaning. In *Canada Sugar Refining Co v R* [1898] AC 735 it was held that:

> Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

[83] Thus, we agree with Ahmad Maarop PCA in *Sivadevi* on the three categories of action and the application of s 21(1) of the LA 1953 to charge actions.

The role of the punctuation comma

[84] Thameez submitted that the approach taken by Rohana Yusof FCJ in restricting the categories of action in s 21(1) of the LA 1953 into two categories instead of three by relying merely on the function of the punctuation comma, while ignoring the word 'or' is wrong. Reliance was made to the Federal Court case of *Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd* [2017] 2 MLJ 557; [2017] 4 CLJ 24, where Arifin Zakaria CJ considered the word 'or' appearing between the words 'insufficient' and 'void' in s 340(2) of the NLC as bringing a disjunctive meaning.

[85] We agree, with respect, that in construing a statute, the existence or absence of punctuation marks is relevant. In fact, punctuation forms part of any statutory enactment and may be used as a guide to interpretation — that punctuation comma may result in either a disjunctive or conjunctive meaning of a statutory provision (*Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112).

[86] That said, we noted too that 'normally, to determine the intent of the law the court would look at a sentence from a purely grammatical point of view so that in construing a statute, the court will disregard a punctuation or will re-punctuate it if that be necessary, in order to arrive at the true purpose and natural meaning of the words employed (*Prithipal Singh v Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, intervener)* [1993] 3 MLJ 336).

[87] In this case, Her Ladyship had sufficiently justified the approach taken with the punctuation comma appearing after the word 'charge' in s 21(1) of the LA 1953. That said, we also agree with Thameez that ignoring the word 'or' that appears prior to and post the words 'to enforce such mortgage or charge' is improper in the circumstances.

[88] Guided by the rules of construction mentioned earlier, we find the need to examine the entire provision of s 21 in order to holistically determine whether, the punctuation comma made the categories of action in that provision as two or three categories. This, taken together with other points — defining action, historical point and past decisions — brings us to a conclusive finding, with respect, that s 21(1) deals with three categories of action and not two, as found by Rohana Yusof FCJ.

The historical point

[89] Rohana Yusof FCJ held on the historical point that:

> When we enacted our s 21(1) of the LA and later introduced the provisions relating to orders for sale under s 256 of the NLC, the Parliament had not provided any limitation period for those proceedings relating to orders for sale especially the fact that summons filed to enforce orders for sale are not 'actions'.

[90] Thameez argued that such interpretation was not grounded on a full appreciation of the authorities and the legislative history of the LA 1953 and the NLC. Pre-1953 cases such as *Sakinah v Kua Teong How* [1941] 1 MLJ 166 and *Haji Abdul Rahman and another v Mahomed Hassan* [1917] AC 209 proves the application of the law of limitations to charge actions.

[91] It was further submitted by Thameez that historically, when the LA 1953 was passed, the statutory land laws in force were the Land Code of the

Federated Malay States ('LCFMS'); and the Conveyancing and Law of Property Ordinance for the Straits Settlements ('CLPOSS'). These laws provided for ways and means of enforcing charges or mortgages. LCFMS provided the creation and enforcement of charges — which remedy was by way of public auction; while CLPOSS allows the mortgagee to sell mortgaged property. It was also highlighted that these laws provided for different remedies for the charge. Significantly, the remedies provided in the LCFMS were reproduced substantially in the NLC in ss 253–265.

[92] As for the period of limitation, the then Limitation Enactment 36 of 1933 was in force in the Federated Malays States when the LCFMS was in force; while the Limitation Ordinance, Chapter 16 was the applicable law for the Straits Settlement. There, different limitation periods apply.

[93] Hence, it was argued by Thameez that at the time of the passing of the Limitation Ordinance 1953, the enforcement of charges and mortgages were all subject to different limitation periods, hence the need to enact a uniform law on limitation.

[94] Secondly, Thameez also brought to our attention s 341 of the NLC which specifically excludes the application of the LA 1953 in the given circumstances, evidencing the fact that when the NLC was enacted, the Legislature was very well aware of the provisions of the LA 1953 although Rohana Yusof FCJ appeared to observe the contrary. Hence, it was argued that had the Legislature intended to exclude the operation of s 21 of the LA 1953, it would have specifically enacted a provision for such exclusion.

[95] Another critical point raised by Thameez was in respect of the differences between then English Limitation Act 1939 and English Limitation Act 1980 with our LA 1953. And that is, on the words 'to enforce such mortgage or charge' appearing in our LA 1953 but is absent in the English Limitation Acts 1939 and 1980. It was emphasised that the LCFMS recognised charges only and the CLPOSS recognised the English concept of mortgages, hence the LA 1953 was to cater for both. In view of this difference, Thameez argued that interpretation of s 21(1) must be based on the express language of our LA 1953 and not the applicable law in England, an approach preferred by Rohana Yusof FCJ.

[96] On this historical point, MABB argued that in order to properly construe the meaning and application of s 21 of the LA 1953, it is important to have regard to the applicable land laws at the time (*Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545). MABB explained that prior to the introduction of the NLC, there were two different systems of land law applicable in Peninsular Malaysia — the

Straits Settlement on one hand, and the Federated Malay States on the other. The former system provided for the creation of mortgage and the right to apply for foreclosure, while the latter system provided for a charge and the right to apply for public sale of the land. Hence, it was presumed that due to the existence of these two different systems of land law, that the words 'mortgage', 'foreclose' and 'charge' were employed in s 21 of the LA 1953.

[97] MABB further argued that it is settled law that limitation will only apply if it is expressly provided in the Limitation Act (*Australia and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304). So, it was urged upon us that the absence of an express provision in the LA 1953 governing an application for an order for sale must be acknowledged.

[98] Hence, it was argued that a reading of s 21 of the LA 1953 as a whole suggests that Parliament has intended to draw a distinction between actions to recover monies secured by a charge and an action to realise the charge security.

Our view

[99] In this regard, Lord Reid in *Beswick v Beswick* [1968] AC 58 as was cited by the Supreme Court in *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449 held, in respect of resorting to legislative history as an aid to construction of a statutory provision that:

> In construing any Act of Parliament, we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there. But if they are capable of having more than one meaning we are, in my view, well entitled to see how they got there ...

[100] Upon analysing parties' submissions, we found that the points raised by Thameez to be compelling. She successfully proved that even before the enactment of the LA 1953 and subsequently the NLC, the limitation law was applied in case of charged and/or mortgaged land. It was also shown to our satisfaction that the NLC, in particular the part relating to charges and order for sale were essentially based on the Land Code for the FMS (Chapter 138).

[101] The Hansard during the Second Reading as referred to earlier by us also shows that land matters were well within the knowledge and contemplation of the drafter of the Bill.

[102] The other reasons put forward by Thameez which is crucial to our minds is the absence of the words 'to enforce such mortgage or charge' in the English Limitation Act 1980 which was cited by Her Ladyship to be in *pari*

materia with our LA 1953. In this regard, we reiterate that:

> the function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant (*Krishnadas*)

[103] Thus, we are of the considered opinion that the said difference must be considered because our LA 1953 was based on the English Limitation law, and such modification and/or addition to our LA 1953 brings, to our assessment, an added category of action in s 21(1). Her Ladyship in fact stated that 'Likewise, it similarly could not have been foreseen that our s 21(1) of the LA, *without the necessary modification*, would cater to the provisions relating to orders for sale in the NLC'. We found that there is necessary modification made to our LA 1953 and that was in respect of the addition of the words 'to enforce such mortgage or charge' in s 21(1) of the LA 1953.

[104] Another compelling finding was s 341 of the NLC which specifically states the Limitation Act 1953 as being inapplicable in the circumstances mentioned therein. On this point, we agree with Thameez that if the Legislature intended to exclude the operation of s 21(1) of the LA 1953, it would have specifically enacted a provision for such exclusion, in the same manner it had enacted s 341 of the NLC.

[105] On this historical point, we are fully satisfied that the legislative history of the LA 1953 and the NLC support the proposition that the limitation period of 12 years applies to charge actions.

Computation of time

[106] Thameez submitted that the computation of time when the limitation period begins is the date of default in repayment and not the date of failure to remedy the breach as in Form 16D. Reference was made to *Wan Zubaidah Sivakadatcham Lim Ban Hooi* and *Sri Rimba Mentari*. MABB did not make any submission on this point because it took the stance that the LA 1953 is not applicable to charge actions.

[107] We have analysed the authorities mentioned in para [62] above and found that four cases — *Peh Lai Huat; Wong Soon Kion; Perwira Affin* and *Jigarlal* — favour the interpretation of the commencement of the limitation period from the 16D notice, while four others (excluding *Sivadevi* at the Court of Appeal's level) — *Lim Ban Hooi*; *Wan Zubaidah; Sivakadatcham* and *Sri*

Rimba Mentari decided that the limitation period begins from the date of default in repayment.

[108] In determining which stance to take, we are fully aware that what needs to be interpreted is the phrase 'when the right to receive the money accrued' in s 21(1) of the LA 1953. We had carefully considered the reasonings of the Justices in those cases cited in para 106 above. Having done that, we found that, with respect, the Justices that decided that limitation period begins from the date of default in repayment provided detailed analysis of the statutory law and authorities as a basis for their stance on the issue.

[109] It is noted that the Court of Appeal in *Wong Soon Kion* and *Peh Lai Huat* referred to s 21(2) of the LA (that in respect of mortgage personal property) and not s 21(1) when holding that the period begins from the 16D notice while the notice in that case was given pursuant to s 256 of the NLC.

Our view

[110] Having considered those cases, we find ourselves in full agreement with the observation made by the Court of Appeal in *Lim Ban Hooi* on the direct correlation between the 16D notice and the default in repayment — that the former cannot be issued without the default in the loan repayment having been triggered first. There, it was stated that:

> Without the underlying contractual relationship, and absent of any breach, the chargee not only cannot but has no right to approach the court under the terms of the National Land Code and O 83 of the Rules of Court 2012 for an exercise of the statutory right of sale. The right to pursue this statutory remedy is triggered by an event of breach or default in the underlying contractual agreement and in the terms of the charge...
>
> ...
>
> Sections 254–256 provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the court for the remedy of an order for sale of the charged land is still dependent on there being a breach of the express or implied agreements. The express agreements are to be found in the charge documents, while the implied agreements are as provided under s 249 of the National Land Code. As expounded by the Federal Court in *S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge.
>
> ...
>
> That right does not and cannot exist in a vacuum, isolated from the underlying contractual agreements reached between the parties. Even the National Land Code recognises those express agreements in ss 249 and 253.

[111] We cannot but agree with the above observation because the 16D notice can never be issued without there being a default in repayment first. And because certainty is important in the law of limitations, the date of the failure to pay is certain as compared to when the 16D notice is issued — for such issuance is dependent upon the chargee's discretion. This point is what the Court of Appeal noted in *Lim Ban Hooi*:

> [65] If the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal*, the time requirements of 'at least one month or such other alternative period as may be specified in the charge' mentioned in s 253, would have been rendered meaningless and of no effect. *If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the ad rem right of order of sale.*
>
> [66] The laws of limitation are intended to protect the rights of all parties concerned. *These laws lend certainty and confidence to the enforcement and safeguarding of rights and remedies and recourse to the courts, preventing abuse through the principle of laches.*

[112] Based on the foregoing, we are of the considered view that the period of limitation in s 21(1) begins from the date of the failure to repay the debt and not from the failure to remedy the 16D notice.

[113] In the upshot, we have to, with great respect, differ from the ratio and the conclusions arrived at in *Sivadevi*, in particular by Rohana Yusof FCJ on the application of s 21(1) of the LA 1953, and by Ahmad Maarop PCA in respect of the commencement of the limitation period. This answers question 6.

What if limitation is successfully established?

[114] Thameez argued that when the limitation period is successfully established, MABB loses absolutely its statutory right to obtain an order for sale — an exclusive statutory right and remedy in the NLC (*Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805; [1997] 3 CLJ 274). The operation of s 340(4)(b) of the NLC becomes activated resulting in MABB not being entitled to the custody of the issue document of title because the liability no longer subsists under the charge (s 244(1) of the NLC). It follows that if MABB refuses to return the title deeds, Thameez is legally entitled to initiate a charge action pursuant to O 83 r 1(1)(f) of the ROC for a declaration under O 15 r 16 of the ROC (*YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24; [2009] 4 CLJ 253).

[115] In response, MABB argued that the discharge of the charge cannot be made until full realisation of the debt because the limitation law only bars the enforcement of rights and does not have the effect of extinguishing MABB's rights and interest under the charge (*Othman & Anor v Mek* [1972] 2 MLJ 158; and *Ali Hassan v Bumiputra-Commerce Finance Berhad* [2003] 6 CLJ 301).

[116] MABB further submitted that O 83 r 1(1) of the ROC cannot be relied on to seek a discharge of the charge and return of the title because this provision merely provides for the procedural requirements for foreclosure or redemption actions (*Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21).

[117] In this regard, Thameez contended that MABB's claim that the discharge of the charge cannot be made until full realisation of the debt is a re-introduction of the equity of redemption — a doctrine which has no place in a Torrens System (*Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504; [1991] 1 CLJ Rep 292; *Talam Corp Bhd & Anor v Bangkok Bank Bhd & Anor* [2016] 6 MLJ 61; [2017] 2 CLJ 365; and *Zulina bt Mohd Omar v Public Bank Bhd* [2018] 2 MLJ 622; [2018] 7 CLJ 586).

[118] MABB responded that although *Tay Lay Soon* did not apply the doctrine of equity of redemption, it nevertheless held that a chargee is entitled to the custody of the title so long as the liability subsists pursuant to s 244(1) of the NLC, and thereafter a chargor is obliged to pay the sum secured pursuant to s 249(1)(a) of the NLC. MABB further argued that based on *Tay Lay Soon*, the right of the chargor is embodied in the provisions of the charge itself — that on the facts of the case, cl 27 of the Annexure to the charge provides that the charge shall not be discharged except on payment of all moneys secured.

[119] It was further argued that under both systems — English mortgage and Torrens System, the liability secured has to be paid before the title can be returned free of the mortgage or charge. The distinction sought by Thameez between the two is of no assistance to her case (*Holmes and another v Cowcher* [1970] 1 All ER 1224; *Hall v Hall* [2018] VSC 131; and *Othman & Anor v Mek* [1972] 2 MLJ 158).

Our view

[120] The Privy Council in *Yew Bon Tew* described a statute of limitations as either a procedural or substantive law. And we had, earlier referred to decided cases that stated the nature and purposes of the law of limitations — which are partly to prevent a claimant from sleeping on his/her alleged rights or interests, to prevent stale claims and to have a definite end to litigation.

[121] Thus, while MABB may theoretically be entitled to claim under the agreement, based on the charge created, its alleged rights or interests are nevertheless legally unenforceable by the lapse of the statutory limitation period. That means, MABB can no longer bring an action in law to enforce or to claim what it regarded as the registrable rights or interests under the charge.

[122] In this respect, we find the words of Syed Agil Barakbah J in *Datin Siti Hajar* as perfectly encapsulating the ultimate result when His Lordship said:

> In my view an indefeasible title means a title which cannot be made null and void in the first place by anything and then only by the provisions creating exceptions. *A defeat by operation of law therefore means a total defeat*.

[123] Having discussed and justified the application of s 21(1) of the LA 1953 to charge actions, we are of the considered view that upon successful establishment of the statutory limitation under the LA 1953, s 340(4)(b) of the NLC is engaged, allowing for the determination of title or interest by operation of law.

[124] In effect, when a chargee fails to obtain an order for sale timeously or at all, or fail to file proceedings in court to obtain a valid and enforceable order for sale of the charged land within the limitation period as prescribed by s 21(1) of the LA 1953, a chargor is entitled to defeat the registered interest of the chargee pursuant to s 340(4)(b) of the NLC and consequently obtain the return of the land title pursuant to s 244(1) of the NLC read with O 83 r 1(1) of the ROC. We therefore answer the main question, question 2 and question 3 in the affirmative.

Declaratory judgment — Is it justifiable?

[125] At the outset, we must state that the sources for the grant of declaration are found in the Specific Relief Act 1950, O 15 r 16 of the ROC and the inherent jurisdiction of the court. Gopal Sri Ram JCA in *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620 stated that:

> Now, the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s 41 of the Specific Relief Act 1950 ...
>
> ...
>
> The procedural adjunct to the statutory basis is to be found in O 15 r 16 of the Rules of the High Court 1980 ...
>
> ...
>
> The alternative basis for the grant of declaratory relief – a jurisdiction of great antiquity – is the inherent jurisdiction of the court: *Kuluwante (An infant) v*

Government of Malaysia & Anor [1978] 1 MLJ 92.

[126] The Federal Court in *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24; [2009] 4 CLJ 253 viewed that:

> Order 15 r 16 is statutory authority for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought.
>
> On this O 15 r 16, Abdoolcader J (as he then was) in *Sungai Wangi Estate v UNI* [1975] 1 MLJ 136 stated that the rule ' has the widest application ... It does not prescribe any procedure nor is it limited to any specific matter. It applies to all proceedings for declaration... where no special procedure is laid down, the claim for a declaratory judgment is brought by way of writ.
>
> Lee Hun Joe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 said: The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion.

[127] Similarly, Abdoolcader J in the Federal Court case of *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 explained that:

> It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act 1950 deals with declaratory decrees and s 41 thereof provides for the discretion of the court as to declarations of status or right. section 41 of the Specific Relief Act was textually adopted *totidem verbis* from s 42 of the Indian Specific Relief Act 1877 (now s 34 of the Indian Specific Relief Act 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, s 41 of the Specific Relief Act gives statutory recognition to a well-recognized type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it. The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of O 15 r 16 of the Rules of the High Court 1980 which will then apply ...

[128] And because it is a declaration of right, there need not be established a cause of action. What needs to be shown is the interest in the issue at hand. This is how Abdul Hamid Embong FCJ (delivering the judgment of the majority) has described in *Affin Bank Bhd v Mohd Kasim @ Kamal bin Ibrahim* [2018] supp MLJ 106:

> [15] *A declaration merely declares the right of the parties. As such, a person seeking for a declaratory judgment need not show or establish a cause of action. He merely needs to show his interest in the issue at hand* (see *Pengarah Tanah dan Galian, Wilayah*

Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135). We agree with Siti Norma J (as Her Ladyship then was) in *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* [1988] 2 MLJ 604 when she made this finding on the standing of one seeking for a declaration:

> The defendants have argued that this action is not maintainable by the plaintiff as it is not a party to the first agreement and being a stranger cannot sue on the agreement. I do not consider that this argument holds any merit as the plaintiff is not suing on the agreement as such but is trying to establish a right given to it under the agreement and to that extent, seeks a declaration that it is a tenant of the defendants. PW Young in his book on *Declaratory Orders* (2nd Ed) defines a declaratory judgment as one that does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order. These are:
>
> (1) there must exist a controversy between the parties;
>
> (2) the proceedings must involve a 'right';
>
> (3) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi';
>
> (4) the controversy must be subject to the court's jurisdiction;
>
> (5) the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims;
>
> (6) the issue must be ripe, ie it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.
>
> All these six conditions are met by the facts of this case and there is therefore no merit to the defendants' contention that the plaintiff's claims cannot be maintained.
>
> [16] The basis for seeking the declarations here is for the court to declare those rights and entitlements of the respondent and any deprivation thereto pursuant to the alleged breach of contract by the appellant, had directly affected those rights and entitlements. The respondent was therefore a person with the proper locus standi to claim those rights. He was not a mere bystander nor a busybody. *In other words, so long as the respondent has a real or genuine interest in having his legal position declared, he can come to court to seek for a declaratory judgment.*

[129] Interestingly, the Federal Court in*Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 stated that the existence of a statutory remedy is no bar to an action for a declaration. Through the words of Raja Azlan Shah AG CJ (Malaya), it was held that:

> In the first place it must be made clear that *the existence of a statutory remedy is no bar to an action for a declaration*. This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration: see *Pyx Granite*. Secondly, all that a

declaration does is to declare the rights of the parties ...

[130] Having cited these authorities, we are of the considered view that the peculiar circumstances of the present case entitled Thameez to file for a declaratory judgment against MABB when there is no statutory remedy available for her as a chargor. Question 4 is answered in the affirmative.

CONCLUSION

[131] The Supreme Court in *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57 reminded us when interpreting a statute that:

> ... dislike of the effect of a statute has never been an accepted reason for departing from its plain language. Holt CJ said nearly three centuries ago '... and Act of Parliament can do no wrong, though it may do several things that look pretty odd' ... (see *City of London v Wood*) ... Accordingly, even if one regarded the policy implicit in (the Act concerned) as open to criticism, (if) the statutory language is clear beyond doubt, (it) must prevail' (see *Stock v Frank Jones (Tipton) Ltd*, ibid per Lord Edmund-Davies at p 238).

[132] Guided by the rules of statutory construction mentioned herein, and upon due analysis of previous courts' decisions, we conclude that s 21(1) of the LA 1953 applies to charges action, which date of commencement shall begin from the date of the default of repayment and not from the failure to remedy the 16D notice.

[133] When the statutory limitation period lapses and is successfully established, the court is legally empowered to determine the question of title or interest by operation of law in s 340(4)(b) of the NLC — which determination has the effect on the indefeasibility or otherwise of the title or interest. The facts and circumstances of the present case illustrate the application of the statutory limitation in the operation of the 'determination of title or interest by operation of law'.

[134] Having answered the questions of law as per the above, we now make the order that the appellant is legally entitled for the return of the issue document of title. Accordingly, we make the following consequential orders:

(a) a declaration that the said third party charge and the said chargee (MABB) shall cease to have any estate or interest whatsoever in the said land and MABB's right to enforce the said third party charge has extinguished by operation of law; and

(b) an order that MABB do deliver to the appellant (Thameez) a discharge of the said third party charge, the duplicate charge, the issue document of title of the said land and any other related documents relevant for the

purpose of effecting the registration of the discharge of the said third party charge to the appellant and/or to the appellant's solicitor within 30 days from today. To dispel any doubt, should the chargee fail to comply with this order, then the discharge of the said third party charge shall take effect by operation of law, that is, immediately upon expiry of the said 30 days.

[135] Premised on the above, we unanimously allow the appeal with costs of RM150,000 subject to allocator fees. The orders of the Court of Appeal and of the High Court are hereby set aside. Orders accordingly.

Appeal allowed.

Reported by Ashok Kumar